

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
APPELLATE DIVISION

LORENA CHIVERTON,)	
Appellant,)	D.C. Civ. App. No. 2001/114
)	
v.)	T.C. Civ. No. 115/1996
DANIEL JOHNSTON, M.D.,)	
Appellee.)	
)	

On Appeal from the Territorial Court of the Virgin Islands

Considered: April 16, 2004

Filed: October 6, 2004

BEFORE : **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **LEON A. KENDALL**, Judge of the Territorial Court, Sitting by Designation.

ATTORNEYS:

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St. Croix, U.S.V.I.

Attorney for Appellant.

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Attorney for Appellee.

MEMORANDUM OPINION

PER CURIAM.

Lorena Chiverton ["appellant", "Chiverton"] appeals from the Territorial Court's dismissal of her medical malpractice action

on summary judgment and presents the following questions for review:

1. Whether it was error for the court to grant summary judgment on grounds the expert opinion of Dr. Susan Montauk failed to affirmatively state her familiarity with the standard of care in the Virgin Islands, where the deadline for producing an expert witness had not yet passed, the opinion submitted met the requirements of Federal Rule of Civil Procedure 26(2)(B), and where the Government had not met its statutory obligation to obtain an independent expert opinion.
2. Whether it was error for the court to grant summary judgment based on the lack of a competent expert witness, where there was an unresolved question on whether liability and causation were matters of common understanding to lay persons.
3. Whether it was error for the court to strike the proffered affidavit of plaintiff's counsel without the benefit of a *Daubert* hearing.
4. Whether the court erred in determining Dr. Montauk's opinion did not meet the requisite standard of certainty for proof of causation.

For the reasons more fully discussed below, the trial court's grant of summary judgment will be reversed, as it violated the nonmovant's right to notice of the issues to be decided and an opportunity to establish a factual basis to avoid summary judgment.

I. FACTS AND PROCEDURAL POSTURE

On March 6, 1995, Chiverton consulted Dr. Daniel Johnston ["Dr. Johnston"] after a serious rash appeared all about her face

and body. [See Compl., Def's Supplemental Appendix ("Supp. App.") at 5-6]. Chiverton contends Dr. Johnston, without performing any diagnostic test or examination, diagnosed her condition as Acquired Immune Deficiency Syndrome ("AIDS"), and further ordered AIDS screening without counseling.¹ [Id.]. Chiverton asserts she became physically and emotionally ill following that diagnosis and was unwilling to leave her home or even confront others, because of the stigma associated with that disease. When Chiverton finally obtained an AIDS test, she tested negative for the disease. She was finally diagnosed as having chickenpox. Chiverton claimed Johnston negligently misdiagnosed her condition, resulting in physical and emotional injury. On October 20, 1995, Chiverton filed a proposed malpractice complaint with the Medical Malpractice Action Committee ["MMAC"] pursuant to V.I. CODE ANN. tit. 27, § 166(i). No expert report was ever produced by the MMAC. Chiverton filed a civil complaint in the Territorial Court on February 15, 1996. The court initially entered default judgment against Dr. Johnston after he failed to answer the complaint; however, that judgment was later vacated on Dr. Johnston's motion. [Appendix ("App.") at 34].

¹ Dr. Johnston refutes Chiverton's assertion that he gave her a diagnosis. Rather, he asserts he ordered AIDS screening as part of his diagnostic process. He has also filed a counterclaim claiming Chiverton's complaint was frivolous.

Just months after the filing of that complaint, the parties deposed each other. Following his deposition of Chiverton, in which she testified she had not consulted an expert nor obtained an expert opinion of malpractice, Dr. Johnston then filed a motion for summary judgment on grounds Chiverton had failed to produce an expert opinion of malpractice. [*Id.* at 13-21].

Chiverton filed an opposition to the summary judgment motion, in which she contended the nature of the case did not warrant expert proof. Chiverton's attorney also filed an affidavit asserting her personal opinion of malpractice based on her experience and knowledge as a registered nurse. [*Id.* at 35-53]. That affidavit was stricken by the court. [*Id.* at 57]. The summary judgment motion remained pending for three years, during which Chiverton filed the expert opinion of Dr. Susan Montauk ["Dr. Montauk"]. Dr. Montauk opined that Dr. Johnston had breached the "applicable standard of care" and outlined several facts to support that opinion. [*Id.* at 65].² She also concluded, after outlining several facts in support thereof, that Dr. Johnston's conduct "likely caused" Chiverton's injuries.

By order entered December 4, 2001, the court granted summary judgment against Chiverton, on grounds Dr. Montauk's opinion

² The copy of that opinion which was included in the appendix is incomplete. However, we have obtained the Territorial Court's file and reviewed the complete opinion contained therein.

failed to demonstrate her knowledge of the applicable standard of care and failed to affirmatively assert causation to a "reasonable degree of medical certainty." [*Id.* at 6-7].³ At the time of the court's ruling, no experts had been deposed and no substantial discovery completed; the only discovery apparent on the record were the depositions of the plaintiff and defendant. Because there was a counterclaim by the defense, the appellant sought and obtained certification of this issue for appeal, and this timely appeal followed.

II. DISCUSSION

A. Jurisdiction and Standard of Review

This Court may review the judgments and orders of the Territorial Court in civil cases. See V.I. CODE ANN. tit. 4, § 33 (1997 & Supp. 2001).⁴ The trial court's grant of summary judgment is afforded plenary review. See *Government of V.I. v. Innovative Communications Corp.*, 215 F.Supp.2d 603(D.V.I. App. Div. 2002). We determine whether, after viewing the evidence and reasonable inferences therefrom in the light most favorable to

³ The copy of the order contained in the appendix is incomplete. Moreover, the title of that order erroneously states it is denying the motion for summary judgment.

⁴ See Revised Organic Act § 23A, 48 U.S.C. § 1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541- 1645 (1994), reprinted in V.I.CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 159-60 (1995 & Supp. 2003) (preceding V.I.CODE ANN. tit. 1) ["Revised Organic Act"].

the non-movant, there appears no genuine issues of material fact in dispute which would permit a reasonable jury to find for the non-moving party. See FED. R. CIV. P. 56(c); *Guardian Ins. Co. v. Bain Hogg Intern. Ltd.*, 52 F.Supp.2d 536, 540 (D.V.I. App. Div. 1999). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). For the purposes of summary judgment, a "material fact" is one whose determination would affect the outcome of the case. See *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994).

Where the trial court's determination rests on its application of legal precepts or interpretation of a statute, our review is also plenary. See *HOVIC v. Richardson*, 894 F.Supp. 211, 32 V.I. 336 (D.V.I. App. 1995), *appeal dismissed*, No. 95-7381 (3d Cir. May 7, 1996). However, we review the trial court's factual determinations for clear error. See *In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 193 (3d Cir. 2000).

B. Expert Evidence and Proof

Appellant challenges the trial court's grant of summary judgment on several grounds. We address issues 1, 2, and 4 together, because they similarly attack the trial court's determinations surrounding the sufficiency of the expert's

opinion and the plaintiff's proof. Appellant first argues that, in ruling on the motion for summary judgment which had as its only basis the appellant's deposition asserting she had personally spoken to no experts nor obtained an opinion of malpractice, the trial court decided an issue that was not properly before it and without notice or adequate time for discovery. Appellant also claims error in the trial court's determination that the expert opinion failed to establish the element of causation.

Following a deposition of the appellant in which she acknowledged that at that juncture she had spoken with no expert nor obtained an opinion of malpractice, Dr. Johnston filed a motion for summary judgment. The sole ground presented for the motion was the absence of any expert opinion on file to support the appellant's claim. That motion was filed on October 18, 1996. Chiverton opposed the motion for summary judgment and argued, *inter alia*, that although she had not personally spoken with experts to obtain an opinion, her counsel had. However, she additionally asserted there had been no discovery conducted at that time nor any deadline set for the production of expert reports; therefore, no report had yet been produced.⁵ Further,

⁵ See FED.R.CIV. P. 26(a)(2)(C)(setting deadline for disclosure of experts at 90 days prior to trial unless otherwise directed by the court.

counsel asserted that no determination had been made regarding which experts would testify at trial, because that decision was premature. [App. at 26-27]. While the summary judgment motion remained pending, appellant filed a supplemental affidavit indicating she had obtained an expert opinion and, on January 3, 2000, the appellant filed that expert opinion with the court. [Id. at 63]. Defendant responded with a motion to strike that supplemental affidavit as untimely, where the underlying motion had been pending for three years. Without acting on that motion and without any additional filings from the parties, the court ruled on the summary judgment motion. In granting summary judgment, the trial court considered the appellant's expert opinion, implicitly denying defendant's motion to strike the same, and found, *inter alia*, that Dr. Montauk had failed to specify the applicable standard of care to which the appellee was held and also failed to opine to the requisite degree of "reasonable medical certainty" that Dr. Johnston's conduct caused the appellant's injuries. This, the Court held, was a fatal flaw which compelled summary judgment. The trial court's error lies not in its consideration of the complete record then before it,⁶

⁶ At the outset, we note that the court clearly opted not to disregard the expert opinion as untimely and, indeed, specifically considered it. This removes any argument that the belated opinion was not properly before the court as a result of being filed after the summary judgment motion, as appellee suggests in his responsive brief. In ruling on a motion for summary judgment, the court may properly consider facts in the "pleadings,

but in failing to provide adequate notice that it would consider the competency of the proffered expert and the substance or sufficiency of that opinion, and additionally in its determination of a factual issue without a full evidentiary record at the summary judgment stage.⁷

1. Failure to Provide Notice or Hearing.

On motion for summary judgment, it is the movant who bears the initial burden of showing the absence of material fact in dispute. See FED. R. CIV. P. 56 advisory committee notes; *Carty v. Hess Oil V.I. Corp.* 78 F.Supp.2d 417 (D.V.I. App. Div. 1999). As we explained in *Carty*, "The onus of showing the existence of fact does not shift to the non-movant until this initial burden is satisfied by a clear showing that there are no disputed material facts." *Carty*, 78 F.Supp.2d at 421; see also FED. R. CIV. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325(1986). The movant's burden may be satisfied by pointing to an absence of sufficient evidence to prevail as a matter of law on an issue on which the nonmovant bears the burden at trial. See *National*

depositions, answers to interrogatories, admissions on file, affidavits and properly authenticated exhibits referred to therein in support of the motion." FED. R. CIV. P. 56(c).

⁷ At the time the summary judgment motion was filed, default had been entered against the defendant and had not been set aside. It was set aside on March 14, 1997, and the court contemporaneously set the time for filing all supporting documents for purposes of the summary judgment motion. [App. 33-34].

State Bank v. Federal Reserve Bank of New York, 979 F.2d

1579,1582 (3d Cir. 1992)(movant has no obligation to produce evidence to negate claim). Only when the moving party has met this burden of production is the nonmovant required to come forward with evidence to support a jury verdict in his favor. FED. R. CIV. P. 56(e) and advisory committee notes ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."); *see also Reed, Wible and Brown, Inc. v. Mahogany Run Development Corp.*, 550 F.Supp. 1095, 1098 (D.V.I. 1982)(noting summary judgment is not to be entered unless movant has established its right to judgment "with such clarity as to leave no room for controversy, and the other party is not entitled to recover under any discernible circumstances")(citations omitted). As this Circuit has stated, and in line with well-settled law, "The court's function, in deciding whether a grant of summary judgment is merited . . . , is to decide whether factual issues exist and not to decide issues of fact," which are to be left to the jury. *See O'Brien v. Eli Lilly & Co.*, 668 F.2d 704, 715 (3d Cir. 1981)(internal citation omitted). Given these standards, a threshold issue here is whether the trial court properly delved into the substance and basis of the expert opinion as a basis for

granting summary judgment, where that issue was not challenged in the defendant's motion and where the nonmovant was given no opportunity to meet those issues.⁸

A court is not constrained from noticing the absence or presence of an issue of material fact not brought to its attention by motion, nor from *sua sponte* granting summary judgment on an issue where warranted. While disfavored, a trial court may grant summary judgment based on its own review of the record and is entitled to consider the full record before it at the time it resolves the motion. *See e.g., See Gibson v. May and Wilmington*, 355 F.3d 215, 224 (3d Cir. 2004); *Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 910 (3d Cir. 1994). However, a *sua sponte* grant of summary judgment is proper only upon fair notice to the nonmovant and an opportunity to respond to the issues the court intends to resolve. *See e.g., Otis Elevator*, 27 F.3d at 910; *cf. Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1069 (3d Cir. 1990) (holding improper court's grant of summary judgment without a defense motion and without Rule 56 notice, where plaintiff was under no compulsion

⁸ Appellant also argues expert testimony was not necessary in this instance, because the claims presented were reasonably discernible by lay persons and, therefore, came within the exception to the rule requiring expert testimony to establish causation. This argument is unpersuasive, as expert testimony is required to establish the standard of care and causation in medical malpractice cases in the Virgin Islands.

to put forth evidence in support of her claims to avoid dismissal); *Brobst v. Columbus Services Int'l*, 761 F.2d 148 (3d Cir. 1985), *cert. denied*, 484 U.S. 1043 (1988)(summary judgment on grounds unrelated to that raised in motion *in limine* held improper because of lack of notice). Therefore, where the trial court determines summary judgment is warranted on an issue not previously raised by motion, it must similarly provide notice to the nonmovant and permit that party an opportunity to attempt to show that there exists a genuine issue of material fact on that issue. See e.g., *Bradley*, 913 F.2d at 1069. Only where a case involves purely legal questions which have been fully developed and where the evidentiary record is complete may a court properly grant summary judgment *sua sponte* without necessarily providing formal notice. See *Gibson*, 355 F.3d at 224(noting, however, that *sua sponte* dismissals are widely disfavored).

Given the absence of any real discovery prior to the court's ruling, the sparse evidentiary record before the court, and the absence of any qualifying hearing surrounding Dr. Montauk's qualifications or opinion, this case does not fall within the exception to the notice requirement, and such notice was required prior to summary judgment being entered. Johnston's summary judgment motion did not assert any facts challenging the sufficiency of the expert's opinion on the issue of causation,

nor did he mount a separate *in limine* challenge to the expert report. The only issue raised by the motion was the appellant's failure to produce an expert opinion. Therefore, having filed an expert opinion prior to the court's decision on the motion and having had no notice that the competency or the substance of that opinion was being called into question, the appellant could not have contemplated that she remained vulnerable to summary judgment at that juncture. Compare *Brobst*, 761 F.2d at 154-55 (noting that *sua sponte* summary judgment on grounds unrelated to those sought in defendant's *in limine* motion effectively precluded plaintiffs from marshaling the record evidence that it had already accumulated on this issue and pretermitted their filing affidavits). Accordingly, summary judgment was improper at that juncture of the proceedings.

Moreover, appellant's argument that the trial court erred in ruling on the motion without a hearing is not without merit, although not for the reasons asserted.⁹ The trial court determined, without stating its reasons, that Dr. Montauk was not competent to testify as an expert witness. Title 5, section 911

⁹ We need not reach appellant's additional argument that a *Daubert* hearing was required before her counsel's affidavit opining malpractice was stricken.

of the Virgin Islands Code,¹⁰ permits expert testimony by a witness who is deemed competent by "special knowledge, skill, experience, or training" and who meets the threshold standard of helpfulness to the jury. 5 V.I.C. § 911 (1), (2); *see also Hines v. Consol. Rail Corp.*, 926 F.2d 262, 272 (3d Cir. 1991); *Cheek v. Domingo*, 628 F. Supp. 149, 152-53 (D.V.I. 1986)(noting knowledge of standard of care in this or similar community also required to be qualified as expert); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 741 (3d Cir. 1994)(noting, in applying Federal Rule of Evidence 702 which substantially mirrors the local rule, that the rule applies to both substantive and formal qualification of experts and is to be liberally applied). Whether a witness is qualified to testify as an expert is a threshold inquiry left to the court in the first instance, in line with its gatekeeping role. *See* 5 V.I.C. § 778; *compare Paoli*, 35 F.3d at 741-50 (applying FED.R.EVID. 104(a)). The decision to hold a hearing to inquire into the qualification of an expert or the propriety of expert evidence is within the court's discretion and is reviewed for abuse of that discretion. *See Padillias*, 186 F.3d at 418. Such an abuse of discretion may be found in the court's failure to hold such a hearing where the ruling on admissibility turns on

¹⁰ *See Enfield Green Homeowner's Association v. Francis*, D.C.Civ.App. 2001/103, decided on the same date.

factual issues. *Id.* at 417-18 (noting importance of hearing to develop the facts on this issue and a complete evidentiary record on which to base the court's decision); *cf. In re TMI Litig.*, 199 F.3d 158, 159 (3d Cir. 2000); *Paoli*, 35 F.3d 717, 739 (noting importance of a detailed factual record and adequate process at the evidentiary stage, particularly when summary judgment may flow from it) (citation omitted).

Faced only with Dr. Montauk's untested opinion and a scant evidentiary record which was bare of even minimal discovery such as expert depositions, the trial court had no basis in fact or law on which to deem Dr. Montauk incompetent to testify on the material issues of the case. The trial court therefore abused its discretion in excluding that testimony without the benefit of a hearing, and the matter must be remanded for an appropriate determination whether Dr. Montauk satisfies the standards of 5 V.I.C. §§ 778, 911(2)(b).

2. "Reasonable Certainty" Standard

We turn next to the court's assessment of the expert opinion as deficient for its failure to specify Dr. Montauk's knowledge of the standard of care applicable to this dispute and its failure to state a finding of malpractice in terms of "reasonable medical certainty." As earlier noted, Chiverton was under no burden to establish *prima facie* evidence of her claim, given the

procedural history of this case as discussed above. However, apart from the failure to properly put Chiverton on notice that summary judgment was being considered based on the competence of her expert, the court's rationale offered in support of its order granting summary judgment was also erroneous and provides an alternative basis for reversal.

Where the plaintiff relies on an expert opinion to establish causation, that opinion must present an explanatory theory and supporting facts, although it need not be exhaustive. See e.g., *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 152 (3d Cir. 1999); see also *Schulz v. Celotex Corp.*, 942 F.2d 204, 208 (3d Cir. 1991). The standard to which expert testimony is held on the issue of causation is one of a "reasonable degree of medical certainty." See *Schulz*, 942 F.2d at 208; *Paoli*, 35 F.3d at 751-66. That standard does not imply a requirement that expert testimony be conclusive on the issue of liability to avoid summary judgment, nor does it require that expert opinions employ particular terms to avoid judgment. See *Schulz*, 942 F.2d at 208; *Heller*, 167 F. 3d at 152 (noting that expert opinion "need not be so persuasive as to meet a party's burden of proof or even necessarily its burden of production"). Indeed, this Circuit has eschewed any requirement that an expert use particular words to meet that burden. See *Paoli*, 35 F.3d at 741; *Schulz*, 942 F.2d

at 208. As the *Schulz* Court noted:

[T]he phrase 'with a reasonable degree of medical certainty' is a useful shorthand expression that is helpful in forestalling challenges to the admissibility of expert testimony. Care must be taken, however, to see that the incantation does not become a semantic trap and the failure to voice it is not used as a basis for exclusion without analysis of the testimony itself.

Schulz, 942 F.2d at 208 (internal citation omitted). Rather, all that is required is that the expert's opinion, taken as a whole, reflect an unequivocal, as opposed to merely speculative, view that the defendant's malpractice was the cause of the plaintiff's injuries. See *id.* (noting the opinion should at minimum reflect expert's confidence in the conclusion formed); compare *Hall v. Babcock & Wilcox Co.*, 69 F. Supp.2d 716, 722 (W.D.Pa. 1999)(noting court must review expert testimony in its entirety); *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107, 109(1959)(The matter does not turn on the use of a particular form of words by the physician expert, since causation is a matter ultimately left to the jury, and not to the physician). Opinions based on mere possibilities are generally held too speculative to survive this standard. See *Schulz*, 942 F.2d at 208-09(noting "possibility," "guess," "could have been," or "strong possibility" or "20-80% probability" invite speculation).

Here, Dr. Montauk unequivocally opined that in diagnosing

and treating the appellant, Dr. Johnston was negligent in his failure to take an adequate history; to perform an adequate physical exam; to apply appropriate criteria for determining the proper treatment; failing to provide necessary counseling when ordering AIDS testing; and in diagnosing AIDS when all indicators pointed to chickenpox. She further noted that Dr. Johnston's conduct constituted a breach of the applicable standard of care in each instance. Dr. Montauk further outlined a number of facts to support her conclusion that Dr. Johnston's care constituted malpractice. As the trial court noted, Dr. Montauk's opinion did not specify the standard of care to be applied in this instance and referred only to the "applicable" standard of care. However, any questions regarding Dr. Montauk's knowledge of what constituted the "applicable" standard of care also should have been left for examination at trial or at a qualifying hearing. It should not, however, serve as a basis for exclusion which results in dismissal of the plaintiff's case. Moreover, Dr. Montauk's use of the word "likely" in concluding there was causation does not *ipso facto* render her opinion impermissibly speculative. Indeed, that conclusion would be unreasonable when viewed in light of the facts and theories presented and the opinion as a whole. Rather, the trial court should have reserved judgment until it had the benefit of a complete record or an

evidentiary hearing. Given the state of the record at that stage of the proceedings, the court's determination of Dr. Montauk's competency and of the sufficiency of her expert opinion constituted an abuse of discretion.

III. CONCLUSION

In view of the foregoing, the court's order granting summary judgment for the appellee and against the appellant will be reversed and the matter remanded to the Territorial Court for further proceedings consistent with this opinion.

A T T E S T:

WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

NOT FOR PUBLICATION

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ATTORNEYS :

Diane Trace Warlick, Esq.
St. Croix, U.S.V.I.
Attorney for Appellant.

Wilfredo Geigel, Esq
St. Croix, U.S.V.I.
Attorney for Appellee.

ORDER OF THE COURT

PER CURIAM.

AND NOW, for the reasons stated in a Memorandum Opinion of
even date, it is hereby

ORDERED that the trial court's order granting summary

judgment in favor of the appellee is **REVERSED**, and this matter is **REMANDED** to the trial court for action not inconsistent with this opinion.

SO ORDERED this 6th day of October, 2004.

A T T E S T:

WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk